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In the Supreme Court
OF THE
United States

No. [redacted] 23

October Term, 1928

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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MARTIN & DICKSON, *Printers*

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To the Honorable the Supreme Court of the United States:

The petition of General Insurance Company of America respectfully shows:

A.
SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a petition for a writ of certiorari to review and reverse a judgment of the United States Circuit Court of Appeals for the Ninth Circuit for error in

affirming a judgment of nonsuit of the District Court of the United States for the Western District of Washington.

Your petitioner is a Washington corporation. Respondent is a Wisconsin corporation. Petitioner, as plaintiff, brought suit against respondent in the District Court for the recovery of more than $3,000. The action was for the recovery of the value of certain wool which was destroyed by a fire alleged to have been caused by the negligent emission of sparks, cinders or live coals from one of respondent's locomotives. (R. 3-10.)

Your petitioner issued two policies of fire insurance to one Peter Agor. These policies covered wool and sacks while contained in a warehouse at Badger, Washington. On May 2, 1926, while these policies were in force, the warehouse and its contents were destroyed by fire. (R. 4, 7, 88, 100.)

Your petitioner paid the loss sustained by Peter Agor, which amounted to $20,481.90, and, under claim of subrogation, brought suit against respondent. (R. 5, 6, 8, 9, 95.) Petitioner alleged that the fire was started by sparks, cinders or live coals emitted from one of respondent's locomotives and that said locomotive was so negligently constructed and operated as

to permit and cause sparks, cinders or live coals to escape and cause the fire. (R. 5, 8.)

Respondent admitted that the wool was destroyed by fire, but denied that one of its locomotives set the fire and denied that it was guilty of any negligence. (R. 11, 12.)

At the conclusion of petitioner's evidence respondent moved for a judgment of nonsuit. (R. 100.) The court granted the motion (R. 100), to which petitioner duly excepted (R. 104), and thereafter judgment of nonsuit was entered. (R. 16.)

Petitioner duly filed assignments of error (R. 40-42), and then appealed (R. 39-44, 104-109), specifying as errors relied upon that "the court erred in granting the motion for judgment of nonsuit and entering the judgment of nonsuit for the reason that the granting of said motion and the entering of said judgment wrongfully prevented the jury from considering and deciding questions of fact alleged in plaintiffs' complaint and testified to by plaintiff's witnesses."

On October 15, 1928, the Circuit Court of Appeals rendered its opinion and affirmed the judgment of nonsuit of the District Court and, upon the same day, its judgment was filed and entered. (R. 120, 121.)

In its opinion (R. 114-120) the Circuit Court of Appeals held:

1. That petitioner's evidence was sufficient to warrant the jury finding that one of respondent's locomotives set the fire and therefore was sufficient to call for the submission of this question to the jury. (R. 118.)

2. That petitioner's evidence was not sufficient to raise a *prima facie* presumption that respondent was negligent in setting the fire or to warrant the jury inferring that respondent was negligent in setting the fire. (R. 119, 120.)

From these holdings the Circuit Court of Appeals concluded that your petitioner's evidence was not sufficient to carry the case to the jury and that the judgment of nonsuit was proper.

ASSIGNMENTS OF ERROR

1. The Circuit Court of Appeals erred in finding and holding that your petitioner's evidence was not sufficient to raise a *prima facie* presumption that respondent was negligent or to warrant the jury inferring that respondent was negligent.

B.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTNORARI HEREIN APPLIED FOR:

1. The decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *McCullen v. Chicago & Northwestern Railway Company,* 101 Fed. 66, upon the same matter.

2. The decision decides an important question of local law in conflict with applicable local decisions of the Supreme Court of the State of Washington, to-wit, the following:

Thorgrimson v. Northern Pacific Railway Company, 64 Wash. 500;

Northwestern Mutual Fire Association v. Northern Pacific Railway Company, 68 Wash. 292;

Fireman's Fund Insurance Company v. Oregon-Washington Railroad & Navigation Company, 96 Wash. 113.

These cases hold proof that a fire is of railroad origin necessitates the determination of a question of fact—of the question of whether or not the railroad was negligent in setting the fire—and requires the

court to submit this issue of fact to the jury. The Circuit Court of Appeals conceded this to be the Washington law, but refused to follow it.

Your petitioner presents herewith to this court and files herewith as an exhibit hereto a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals, together with your petitioner's brief in support of this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 5484, General Insurance Company of America, a corporation, Appellant, v. Northern Pacific Railway Company, a corporation, Appellee, and that the said judgment of the said Circuit Court of Appeals may be reversed by

this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray and so forth.

GENERAL INSURANCE COMPANY
OF AMERICA,
By HAWTHORNE K. DENT,
Its President.

JAMES B. HOWE,
DONALD G. GRAHAM,
JAMES B. HOWE, JR.,
Counsel for Petitioner,
Stuart Building,
Seattle, Washington.

In the Supreme Court
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No.....

October Term, 1928

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

Brief of Petitioner in Support of Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

I.

THE OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals is reported in 28 Fed. (2d) 574, and in the Record at pages 114-120. The opinion of the District Court appears in the Record at pages 101-104.

II.

JURISDICTION

The date of the judgment to be reviewed is October 15, 1928. (R. 121). Jurisdiction of this Court to review by the writ of certiorari the judgment of the Circuit Court of Appeals is invoked under Judicial Code Section 240, as amended by the act of February 13, 1925, 43 Statutes at Large 938.

III.

STATEMENT OF THE CASE

On the day of the fire the wind was blowing from the railroad tracks toward the warehouse which contained the wool which was destroyed. (R. 51). About 9:45 P. M., which was about fifteen minutes prior to the time the fire was discovered, one of the railroad company's freight trains passed by the warehouse. (R. 84, 86). The train was hauled by two locomotives, consisted of seventy freight cars (R. 85), and was going up a heavy uphill grade as it passed the warehouse. (R. 59, 86, 91).

These facts are pointed out in the opinion of the Circuit Court of Appeals. (R. 115-118.) The opinion stated the facts fairly, but fails to point out that the railroad sometimes divided its trains in order to avoid the heavy laboring caused by the upgrade. (R. 91.) Inasmuch as the country was very dry (R. 71), the

jury, if permitted to pass upon the question, might have decided that the railroad company was negligent in not dividing its 70-car train which passed the warehouse on the night of the fire. It is, however, unnecessary to review the facts, because the Circuit Court of Appeals found that your petitioner's evidence was sufficient to warrant the jury finding that one of the railroad company's locomotives set the fire. This has been pointed out under heading A in the petition for the writ of certiorari where a full statement of the case has been given. In the interest of brevity such statement is not repeated here.

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the judgment of nonsuit of the District Court, because the question of whether or not the railroad company was guilty of negligence was a question of fact which your petitioner was entitled to have the jury pass upon.

V.

ARGUMENT

(a) The Issue

This case presents no question concerning the admission or the rejection of testimony. The only question it presents is that of the effect of the evidence

which is in the record—the question of whether or not that evidence was sufficient to require the case to be submitted to the jury.

The Circuit Court of Appeals held that petitioner's evidence (1) was sufficient to warrant the jury concluding that the railroad company set the fire, but (2) was not sufficient to authorize the jury inferring and finding that the railway company was guilty of negligence.

Your petitioner contends that the tracing of the cause of a fire to a railway company raises a question of fact—the question of whether or not the railway company was negligent in causing the fire—and authorizes the drawing of the inference (or raises the *prima facie* presumption) that the railway company was guilty of negligence, particularly when the setting of the fire is wholly unexplained by the railway company.

There is no liability on the part of a railway company unless it is guilty of negligence, but, your petitioner contends, the negligence of a railway company may be established as fully and competently by an inference which a jury may draw from facts establishing the origin of the fire as it might be by direct evidence. From the fact that a railway company

caused a fire the jury may draw, or refuse to draw, the inference that the railway company was negligent; but the question can not be decided one way or the other without a question of fact being determined and, therefore, a court may not enter a judgment of nonsuit, when a plaintiff's evidence is sufficient to fasten the origin of the fire upon the railway company, without invading the province of the jury and depriving the plaintiff of the right to have the jury ascertain the facts.

The issue, simply stated, is this: Does proof of the origin of a fire authorize the drawing of an inference of negligence therefrom?

This question has been before the courts ever since railroads have been operated, but the Supreme Court of the United States has never passed upon it. There is conflict in the decisions of the state courts, but the Washington cases and the Federal cases decide this issue in favor of the contention of your petitioner.

Your petitioner contends: (1) that the decision of the Circuit Court of Appeals is contrary to the law as decided by the Federal courts; (2) that the decisions of the Supreme Court of the State of Washington establish, as a matter of substantive local law, the right of a plaintiff able to trace a fire to a railway

company to have his case go to the jury, and that the Circuit Court of Appeals erred in failing to follow the local law.

(b) Favorable Federal Cases

McCullen v. Chicago & N. W. Ry. Co., 101 Fed. 66 (C.C.A. 8th Circuit), arose in South Dakota. The facts were very similar to the facts in the case at bar. It is squarely in point. In the opinion Thayer, J., said:

> "It is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property. * * * These reasons have led most courts to hold,—and the doctrine, as we think, should be adhered to,—that proof that property has been destroyed by sparks emitted by a passing locomotive creates a presumption that, through a want of proper care on the part of the owner thereof or its employes, the locomotive in question was not provided with a proper spark arrester, or that it was not at the time in a good state of repair, or that its locomotive was carelessly handled."

The *McCullen* case was cited with approval in *Great N. Ry Co. v. Coats,* 115 Fed. 452 (C.C.A. 8th Circuit), which also arose in South Dakota. In the *Coats* case the evidence established a specific act of negligence, but it is apparent from that portion of the opinion quoted below that Thayer, J., was of the

opinion that a presumption of negligence was established by the tracing of the origin of the fire and did not depend, for its existence, upon the proof of the specific act of negligence. Thayer, J., said:

> "The testimony in question not only created a presumption of negligence on the part of the defendant company, but in so far as it showed the company had allowed combustible material to accumulate on its right of way, it established a specific act of negligence, to which the injury complained of might well be attributed."

Eddy v. Lafayette, 49 Fed. 807, 163 U. S. 456, arose in Indian Territory. The trial court charged the jury as follows:

> "The Court further instructs the jury that evidence showing that the fire originated from sparks of a passing engine is *prima facie* proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence."

The plaintiff recovered judgment in the District Court. The case was carried to the Circuit Court of Appeals, seventy-four errors being noted in the assignment of errors. In referring to the instructions given the jury by the trial court the Circuit Court of Appeals said:

> "It also instructed them, in substance, that the fact that a fire had been occasioned by sparks from a passing engine was *prima facie* evidence of negligence. * * * It is also incumbent on a rail-

way company to show that it has used all those reasonable precautions which the law exacts, when it is proven that adjacent property has been damaged by a fire, which was occasioned by sparks or cinders from a passing locomotive. The decisions to this effect are both numerous and uniform. Shear & R. Neg. Sec. 676, 678 and citations."

The Circuit Court of Appeals affirmed the judgment of the District Court and the case was then carried to the United States Supreme Court where it was contended that the instruction above quoted was erroneous and that the Circuit Court of Appeals erred in not correcting the alleged error. The Supreme Court affirmed the judgment of the Circuit Court of Appeals, but refused to pass upon the propriety of the instruction and disposed of this claim of error in the following language:

"It is sufficient to say that no exception was taken to this part of the charge in the trial court, nor was it assigned for error in the Circuit Court of Appeals."

The *Eddy* case was cited with approval in the *McCullen* case and the *Coats* case.

Missouri Pac. R. Co. v. Texas & P. R. Co., 33 Fed. 360;

Missouri Pac. R. Co. v. Texas & P. R. Co., 33 Fed. 361.

These two cases arose in Louisiana and were decided in 1888. In each case the origin of the fire was traced to the defendant railway company. In neither case does the opinion disclose any evidence of negligence. In each case the presumption theory is referred to and the claimant was allowed to recover from the defendant railway company. It does not appear, in either opinion, that there was any statute in Louisiana making proof of the origin of a fire *prima facie* evidence of negligence and in the later Louisiana case of *Fuller v. Chicago R. I. & P. Ry. Co.* (1915), 137 La. 997, 69 So. 804, there is no reference to a statute although the presumption theory is advanced and followed.

(c) Hostile Federal Cases

The cases discussed under this heading are the five cases cited by the Circuit Court of Appeals in support of its decision. It is submitted that not one of these cases decides the issue at bar contrary to the contention of your petitioner. These cases will be considered in the order in which they were decided.

Nitroglycerine Case, 15 Wall. 524, 21 L. ed. 206.

This case involved the question of the liability of an express company for the explosion of a box of nitroglycerine which was in its custody. The case was tried by the court without the intervention of a

jury. The court found that the defendants did not know, or have any means of knowing, what the box contained or that it was dangerous.

The manner in which the box was handled was fully explained and, from the explanation, the court found that there was no negligence in the manner in which the box was handled. This was a finding upon a question of fact and would have been none the less so had the court found that the defendants had been negligent. The court could not have decided the case one way or the other without deciding either that there was, or was not, negligence. If there had been no explanation of the explosion the court might have infered that it was caused by negligent handling of the box. But because of the explanation which convinced the court that there was no negligence there was no cause for inference to the contrary.

Your petitioner does not contend that proof of a fire conclusively establishes negligence or liability. Your petitioner merely contends that it may *and that it does* when the fire is unexplained and the manner in which it occurred, or the fact that it occurred, convinces the jury that there was negligence, or causes the jury to draw the inference that there was negligence. The *Nitroglycrine* case was not one in which the plaintiff was nonsuited, without being given the

opportunity to have a judicial determination of the care exercised by the party causing the damage and in possession of all the information in regard to the happening of the accident.

Garrett v. Southern Ry. Co., 101 Fed. 102.

This case arose in Tennessee and the opinion was written by the present Chief Justice of the United States Supreme Court. The trial court submitted the case to the jury, which found for the defendant. The sole question presented to the Circuit Court of Appeals for the Sixth Circuit was whether the rule which the trial court laid down as to the burden of proof was correct. The trial court instructed the jury:

> "That, if the jury found as a fact that under the present approved methods of constructing and operating locomotives it was improbable that fire could be communicated by sparks from an engine without negligence, then the jury would be justified in inferring as a fact, from the mere circumstance of the fire and its origin in the emission of sparks, that the fire was caused by the negligence of the defendant. The court declined to charge the jury, as a matter of law, that mere proof that the fire was caused by sparks from an engine was *prima facie* evidence of the negligence of the defendant."

It is very evident from the opinion and its reference to the *Nitroglycerine* case that the court decided that proof of the ignition of a fire by sparks (1) raises

no presumption of law as to negligence, but (2) does authorize the drawing of an inference of fact which, if drawn, establishes negligence as a fact and renders inapplicable the rule of the *Nitroglycerine* case which holds, merely, that there is no liability unless negligence is somehow established.

The *Garrett* case does not hold that a jury may not infer negligence, from the fact of the fire, and thereby establish negligence. On the contrary it authorized such an inference and, your petitioner submits, it is highly favorable to your petitioner's contention. The *Garrett* case is the case chiefly relied upon by the court in deciding the case at bar against your petitioner.

Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co., 139 Fed. 528.

This case merely affirms the rule that where the gravamen of the action is negligence the plaintiff must establish negligence. The tenor of the opinion, by Lurton, J., is that negligence may be inferred from the facts and circumstances surrounding the happening of the accident. The opinion cites the *Garrett* case and does not cite the *McCullen* case (which was reported in the same volume of the Federal Reporter as the *Garrett* case), but it recognizes the fact that there are many jurisdictions in which the mere fact

of fire started by sparks is held, irrespective of statute, to be *prima facie* evidence of negligence. The trial court refused to direct a verdict, and permitted the case to go to the jury, which found for the plaintiff. The judgment of the trial court was affirmed.

Toledo, St. Louis & W. R. Co. v. Star Flouring Mills Co., 146 Fed. 953, arose in Ohio under a statute making the fact that a fire was set to property adjacent to a railroad by sparks escaping from a locomotive *prima facie* proof of the railway company's negligence. The trial court properly let the case go to the jury, but its judgment was reversed because of an instruction to the effect that the statutory *prima facie* proof of negligence could be overcome only by a preponderence of evidence showing the defendant's lack of negligence. The decision admitted that proof of the fire was sufficient to require the submission of the case to the jury and the opinion by Lurton, J., dealt with the question of the force of the statutory presumption. The fact that this decision was cited in the case at bar indicates that the court overlooked the real issue which was not where the burden of the proof rested after a case for the jury had been made out, but was whether or not a case for the jury had been made out.

Louisville & N. R. Co. v. Bell, 206 Fed. 395, arose in Tennessee where there was no statute relating to the setting of fires. A motion for a directed verdict was denied and the case was submitted to the jury, which found for the plaintiff, and the judgment of the trial court was affirmed. The Circuit Court of Appeals found that there was proof tending to show that the railway company's locomotive was negligently operated and specifically refused to pass upon the question of whether or not the mere fact of the setting of the fire would have been sufficient to carry the case to the jury.

In not one of the cases cited in the opinion of the Circuit Court of Appeals, in the case at bar, was there a judgment of nonsuit or a directed verdict. Not a single Federal case has been found in which the jury has been denied the privilege of drawing the inference that the defendant railway company was negligent from the fact that the railway company set the fire. Every case (save the *Nitroglycerine* case which was tried by the court) went to the jury. The correctness of your petitioner's contention is clearly illustrated by two English cases too closely in point to be disregarded.

(d) The English Cases

Aldridge v. Great W. R. Co., 3 Man. & G. 515, 133 Eng. Rep. 1246, was decided in 1841. The complaint alleged that the locomotive of the defendant was carelessly managed and operated. The parties agreed that a locomotive set the fire in question and that the locomotives used upon the railway were such as were usually employed on railways. The parties agreed that the locomotive which set the fire complained of was used, at the time, in the ordinary manner and for the purposes authorized by the act of parliament incorporating the railway company. The property which was burned was adjacent to the railway tracks. Upon these agreed facts the case was submitted to the court for its decision, the court being requested to enter judgment for the plaintiff or judgment of nonsuit, according to its opinion. A statute permitted the court to accept and decide a case in which all the facts were agreed upon.

The court held that the facts stated did not permit the entry of a judgment for the plaintiff or a judgment of nonsuit because the court could not draw the inference that the defendant was negligent, or find that the defendant was not negligent, without deciding a question of fact, and, therefore, that the case was not the kind of a case contemplated by the statute

relating to agreed cases and would have to go to trial in order that the question of fact might be decided. It is worthy of note that the agreed statement of facts did not state or show that such a fire had ever happened before or that sparks had ever previously come from the locomotive. One of the three judges (all of whom agreed in the decision) remarked that if the judges were called upon to decide the question of fact of whether the railway company was negligent there would probably be a difference of opinion.

Pigott v. Eastern Counties R. Co. (1846), 3 C. B. 329, 136 Eng. Rep. 92, supports the view that proof of the origin of the fire warrants the drawing of the inference that the defendant railway company was negligent in setting the fire. In the opinion Tindall, C. J., said:

> "The defendants are a company entrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage: and the law requires of them that they shall, in the exercise of the rights and powers conferred upon them, adopt such precautions as may be reasonably necessary to prevent damage to the property of third persons through or near which their railway passes. The evidence in this case is abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendant's engines; and there was no proof of any precaution adopted by the

company to avoid such a mischance. I therefore think that the jury came to a right conclusion, in finding that the company was guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance * * *."

Maule, J., referring to the fire, said:

"I am far from saying that it is impossible that this could have occurred without negligence on the part of the company. But it at least affords a strong presumption of negligence in the absence of evidence to shew that something had been done by the company to lessen the chances of danger. It appeared that no steps of that sort had been taken, * * *. Upon the whole I think the verdict would have been wrong if it had been the other way."

The rule in the State of Washington is illustrated by the three cases which will now be given attention.

(e) WASHINGTON CASES

Thorgrimson v. Northern Pacific,
64 Wash. 500.

In the opinion the court said:

"The rule putting the burden on the railway company to explain the cause of a fire following a passing engine, to which this court is probably committed (*Overacker v. Northern Pac. R. Co.,* ante p. 491, 117 Pac. 403), and which counsel relied on to carry the case to the jury on the questions of equipment and operation, is one of necessity, and is applied so that justice may not be defeated. * * * It is the proof of setting the fire * * * that raises the inference of negligence and shifts the burden of proof."

Northwestern Mut. Fire Assn. v. N. P. R. Co., 68 Wash. 292.

In the opinion the court said:

"In a foot note to the case of *Atchison etc., R. Co. v. Geiser*, 1 Am. & Eng. Ann. Cases, the annotator, at page 815, says:

" 'In England and in many of the states of the Union, it is held that the mere fact of communication of fire by a railroad engine is, of itself, sufficient to raise a presumption of negligence against the railroad company, or, in other words, that proof of such communication is sufficient to make out a *prima facie* case of negligence against the defendant in an action for injuries caused by the fire.'

"After supporting this statement by citing numerous cases, the annotator, at page 816, further says:

" 'In some jurisdictions this doctrine is the result of express legislative enactment, or is, at least, sanctioned by statute. Such, as will appear from the decisions above cited from those states, is the case in Arkansas, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, New Jersey, North Dakota, Ohio, Utah, and Vermont. But in many, if not all, of the other states from which decisions are cited above, the rule has been adopted irrespective of statute; and in a number of cases it has been expressly stated that the principle is one of the common law, and not dependent upon legislative enactment.'

"This statement, which is in harmony with our own decisions, is also supported by additional citations of authority from North Carolina, South Dakota, and Tennessee."

If not before, the rule contended for certainly became the law in the State of Washington in *Fireman's F. I. Co. v. Oregon-Wash. R. & N. Co.*, 96 Wash. 113, in which case counsel for the defendant railway conceded that it was the law. In this case, in which there was no direct proof of any act of negligence, the court held that the plaintiff's circumstantial evidence was sufficient to carry the case to the jury and support the jury's verdict in plaintiff's favor. The defendant's evidence showed that the defendant's locomotive was equipped with the best known appliances on the market for the purpose of arresting sparks. The court held the plaintiff's circumstantial evidence warranted the jury passing upon the question of whether said appliances were properly adjusted and kept in good repair and also upon the question of whether the locomotive was operated with ordinary and reasonable skill.

Your petitioner contends that these three Washington cases establish, as a matter of substantive law, the right of jury trial in a plaintiff able to prove a fire of railroad origin and that the Circuit Court of Appeals erred in failing to follow the local law and denying your petitioner the privilege of having the jury pass upon the question of the negligence of the respondent railway company.

(f) Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers and that a writ of certiorari should be granted to review and reverse the decision of the Circuit Court of Appeals.

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